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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 543

MICHAEL MONICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 33–40) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1961. The petition for a writ of certiorari was filed on November 11, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence sustained petitioner's conviction for conspiracy to violate 21 U.S.C. 174, with

particular reference to the presumption, under the statute, arising from the unexplained possession of narcotics.

STATEMENT

Petitioner was convicted in the United States District Court for the Eastern District of New York of conspiracy to violate 21 U.S.C. 174.[1] He was sentenced to imprisonment for eight years (R. 31a–32a). The court of appeals affirmed (Pet. App. 33–40). The evidence may be summarized as follows:

1. *Transaction of March 30–31, 1959.* A federal narcotics agent placed an order for five ounces of pure heroin at $2,800 with defendant Freeman on March 30 and was directed to communicate with a person known as "Slim" in Brooklyn. Unknown to Freeman, Slim was in fact a special employee of the Narcotics Bureau, whose real name was Woodruff (Tr. 1–6). The agent did as directed.

That evening at 8:15 p.m., petitioner was seen to come out of an apartment in Brooklyn and sit in his Ford car with the motor running until 9:00 o'clock, when he re-entered the apartment building. At 9:15 Vallacci arrived and entered the building. Five minutes later, the two emerged and conversed for a short time. Vallacci then went back into the building while petitioner drove off (Tr. 37–41).

[1] Nine other defendants were named as conspirators, including: Freeman, Vallacci, Wagner, and Horton. Freeman was convicted after a jury trial commencing January 5, 1960. The other named defendants pleaded guilty either before or during this trial (Pet. App. 34). Petitioner's trial did not commence until November 28, 1960, due to delay in his apprehension (Tr. 80, 132).

At 9:30 p.m., Wagner, Sperling and Freeman met at a florist shop operated by the latter. Then Sperling drove off in Horton's Oldsmobile, which he parked on Webster Avenue near Gun Hill Road in the Bronx (Tr. 105). At 12:30 a.m., Freeman drove up and let out Horton, who entered the Bronx River Bar, on the corner of Gun Hill Road and Webster Avenue (Tr. 105–106).

At 1:15 a.m., petitioner came back to the Brooklyn apartment and was seen through the window receiving from Vallacci a brown paper package which he placed in his shirt pocket (Tr. 119–121). Petitioner then drove to the Maple Bar on White Plains Avenue, near Gun Hill Road, where he engaged in conversation with Sperling (Tr. 118–122, 47–48). At 2:30 a.m., Sperling came out of the bar and went to Horton's Oldsmobile, placed a package in the front seat, then walked past the Bronx River Bar and nodded (Tr. 49–50, 106–107). Horton then came out of the Bronx River Bar and drove his Oldsmobile to Slim's apartment in Brooklyn where he delivered five glassine envelopes of heroin to Slim and the narcotics agent (Tr. 11–12, 31–32).

2. *Transaction of April 4–5, 1959.* Following arrangements made by the narcotics agent with Freeman for the purchase of three ounces of heroin (Tr. 14–15), Horton talked with Freeman at the latter's florist shop from about 9:00 to 10:00 p.m. on April 4. Horton then drove his Oldsmobile to Webster Avenue and Gun Hill Road, where he parked and locked it (Tr. 66–67). At 11:30 p.m., petitioner, accompanied by Wagner,

drove his Ford past the parked Oldsmobile about a hundred yards, made a U-turn and returned at a very slow speed and then drove off (Tr. 67–68). At 12:30 the two returned. Wagner got out, unlocked the door of the Oldsmobile and placed a brown paper bag in the driver's seat. He then relocked the door and went into the Bronx River Bar, while petitioner drove off (Tr. 68–70). At 1:30 a.m., Horton came out of the bar, unlocked his car and drove off (Tr. 70). He was followed by officers and arrested a few blocks away. The agents seized a brown paper bag on the driver's seat which contained twenty-five envelopes of heroin (Tr. 71–73, 96–97).

3. *Transaction of May 6–7, 1959.* On May 6, the federal narcotics agent made arrangements with Freeman to purchase twenty ounces of cut heroin, delivery to be made the following day (Tr. 21–22). That evening, another agent listened in on a conversation between petitioner and Vallacci. He heard Vallacci say, "John's customer in Brooklyn is taking a half." Petitioner said, "A half" and "All right." Vallacci next said, "Get a half and a quarter, too," to which petitioner replied, "A half and quarter—okay." The last thing that the agent heard was Vallacci saying to petitioner, "Be careful." (Tr. 74–75). The following day, two people who worked for Freeman were arrested as they made delivery of one hundred twenty envelopes of heroin mixture, weighing approximately 121 ounces (Tr. 23–27, 31–32).

ARGUMENT

1. In attacking the sufficiency of the evidence, petitioner stresses the apparent confusion in the amounts of narcotics involved in the third transaction and the cryptic references to "half" and "quarter" in the conversation between petitioner and Vallacci. It may be, as the court of appeals observed (Pet. App. 37, fn. 1), that these seeming discrepancies are explainable, but we see no necessity for delving into this question. Petitioner was not charged with a substantive offense on May 7, but with participation in a general conspiracy to violate the statute, of which the incident in question was merely evidentiary. Petitioner's participation in the conspiracy appears quite clearly from the March transaction, where the evidence justified the inference that petitioner had manual possession of the narcotics subsequently seized (*supra,* p. 3). His participation appeared even more clearly in the April transaction, when he and Wagner delivered a brown paper package to the parked Oldsmobile; when another conspirator was arrested shortly thereafter in the Oldsmobile, the brown paper package in the front seat was found to contain heroin (*supra,* pp. 3–4).

2. Under the facts of this case, it is not necessary to reach the question as to whether the statutory presumption of knowledge of illegal importation arising from possession applies to one who is not himself shown to have had possession of the narcotics where possession by a co-conspirator (or a principal of an aider and abettor) is shown. This

is an issue as to which the Second Circuit divided equally in *United States* v. *Santore*, 290 F. 2d 51, certiorari denied *sub nom. D'Aria* v. *United States*, 365 U.S. 834; see also *United States* v. *Hernandez*, 290 F. 2d 86.[3] In this case the members of the panel affirmed the conviction for different reasons. Two judges considered the instruction proper. Judge Friendly thought the instruction, which was not excepted to, was too broad but saw no occasion to invoke the plain error rule. He also pointed out that the evidence warranted a finding of direct participation by petitioner on each of the three occasions mentioned (Pet. App. 38–40). For the reasons set forth in his opinion, the applicability of the presumption to co-conspirators not in actual possession is not really presented here.

In the first place, the evidence tended to show manual possession by petitioner in the first transaction above referred to and dominion and control of the narcotics in the second transaction. Such control, the entire court agreed in *Santore*, was sufficient to raise the statutory presumption of Section 174.

In the second place, the instruction which petitioner

[3] Other circuits are in accord with the majority of the panel in this case that possession by a co-conspirator is sufficient. *Valentine* v. *United States*, 293 F. 2d 708, 712 (C.A. 8), petition for a writ of certiorari pending, No. 705 Misc., this Term; *United States* v. *Maroy*, 248 F. 2d 663, 666 (C.A. 7), certiorari denied, 355 U.S. 931.

claims to be erroneous was not excepted to. The trial court charged (R. 20a):

> * * * I point out that possession of narcotics by an accused need not be physical possession. Such possession may be constructive possession, *i.e.*, by an individual over which the accused has dominion or control, or possession by co-conspirators or agents, if any, of the accused.

Petitioner urges that the point was preserved by the trial court's denial of the following requested instruction (R. 29a–30a):

> Request 8: The crime charged in the indictment is one overall conspiracy to violate sections 173 and 174 of Title 18, United States Code. (The narcotics laws of the United States.)
>
> To constitute a violation of the aforementioned laws, it is an essential element of said crime that the defendant Monica had knowledge that the drugs involved had been imported into the United States illegally.
>
> If you find that the defendant Monica did not have knowledge that the drugs involved had been imported into the United States illegally, then you must acquit him.

This request was incomplete without reference to the statutory presumption which arises either from actual manual possession or from that possession which exists when dominion and control of the narcotics can be asserted. The request for such an instruction therefore does not amount to an exception to the instruction actually given on the presumption.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

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